UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,

Plaintiff,

- against -

UNITED STATES DEPARTMENT OF DEFENSE,

Defendant.

05 CV 3941 (JSR)

DECLARATION OF PAISLEY DODDS

I, PAISLEY DODDS, pursuant to 28 U.S.C. § 1746, do hereby declare:

1. I am currently Bureau Chief of the London bureau of The Associated Press ("AP"), the plaintiff in this Freedom of Information Act ("FOIA") lawsuit. I submit this declaration in opposition to the summary judgment motion of the Department of Defense ("DOD"), because DOD has withheld from AP important information contained in the records of military tribunals that are the subject of this litigation.

2. The Associated Press is a not-for-profit, news sharing co-operative that gathers and disseminates the news to newspapers, magazines, broadcasters, cable television operators and Internet content providers throughout the United States and around the world.

3. Until March 30, 2005, I was AP's Caribbean News Editor, based in San Juan, Puerto Rico. In that capacity, I supervised AP's reporting on recent events at the U.S. Naval Base in Guantanamo Bay, Cuba, including the conduct of Combatant Status Review Tribunals ("CSRTs" or "Tribunals") convened by DOD. I personally attended and reported on about a half dozen CSRT hearings. My statements in this Declaration are based on my own personal knowledge.

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BACKGROUND OF AP'S FOIA REQUEST

4. Following the attacks of September 11, 2001, the United States government captured and took custody of many "enemy combatants" during military operations in Afghanistan against al-Qaeda and the Taliban regime. I understand it also detained individuals in other countries who it considers also to be enemy combatants due to perceived connections to al-Qaeda and other terrorist groups.

5. Since January 2002, hundreds of these detainees have been housed at the Naval Base in Guantanamo Bay ("Guantanamo"). According to a DOD news release, about 750 detainees have been held at one time or another at Guantanamo. *See* DOD News Release No. 400-05, issued April 26, 2005. (A true and correct copy of this news release is attached hereto as Exhibit A.) As of April 26, DOD reported that 167 detainees had been released outright from Guantanamo, with 67 others transferred to the control of another country. *Id.* Some 520 men are still being held virtually *incommunicado* at Guantanamo as "enemy combatants."

6. DOD has generally refused to reveal or confirm the identities of the detainees at Guantanamo, declining to release their names or countries of origin. As far as I am aware, DOD has only confirmed such identifying information if a detainee files a lawsuit challenging his detention. Without this information, however, it is virtually impossible for any reporter to research the individuals being held, investigate the nature of their actions adverse to the U.S., or confirm the accuracy of claims made by DOD concerning their enemy combatant status.

7. In 2004, the United States Supreme Court declared the enemy combatants being held by DOD to have certain legal rights and recourse to U.S. courts. DOD then promptly announced the formation of the Tribunals whose records are at issue in this case. According

to DOD, the CSRTs were created to provide a "neutral decision-making panel" that would be a "forum for detainees to contest their status as enemy combatants," as required by the Supreme Court. *See* DOD News Release No. 651-04, issued July 7, 2004. (A true and correct copy of this news release is attached hereto as Exhibit B.) The definition of an "enemy combatant" used by the Tribunals is set out in the order establishing the Tribunals. (*See* Hecker Dec., Ex. J.)

8. The CSRTs were described by DOD as a "one-time" proceeding, meaning they were to be the only opportunity a detainee has to challenge the facts upon which DOD asserts he is as an "enemy combatant." Rear Admiral James M. McGarrah, Director of Administrative Review of the Detention of Enemy Combatants, described the purpose and functioning of CSRTs to the Senate Judiciary Committee on June 15, 2005. (A true and correct copy of his written statement to the Committee is attached hereto as Exhibit C.)

9. The Tribunals were charged with the task of conducting "fact-based" proceedings to determine whether the Guantanamo detainees are properly classified as enemy combatants and to permit each detainee the opportunity to contest that designation. Each Tribunal was composed of a panel of three commissioned armed forces officers. The detainee was not allowed to be represented by legal counsel, but he was aided by another military officer as his "Personal Representative." I understand that the detainee did not have access to any confidential information presented to the Tribunal, and that the Personal Representative had an obligation to present the Tribunal with any inculpatory information learned while assisting a detainee. (A true and correct copy of the transcript of a Department of Defense briefing by Navy Secretary Gordon England on July 30, 2004, describing the hearing process more fully, is attached hereto as Exhibit D.)

10. The CSRTs I personally attended were conducted like a hearing. The detainee was accompanied by his representative and offered the option of taking an oath. The detainees were told the factual bases for their imprisonment, unless that information was classified, and the detainee was allowed to respond. The proceeding was recorded on an audiotape.

11. In the proceedings I observed, the detainee had an opportunity to testify on his own behalf and to present documents and written statements. Although many detainees asked to bring witnesses from abroad, I understand that not one witness was brought to Guantanamo to testify for a detainee. Some detainees did call as witnesses other prisoners being held at Guantanamo.

PRESS ACCESS TO THE TRIBUNALS

12. Soon after DOD announced the creation of the Tribunals, Navy Secretary England stated that DOD's "plan is to have open hearings." (A true and correct copy of the transcript of a July 16, 2004 briefing by Secretary England is attached hereto as Exhibit E.) The U.S. government also reported to the United Nations Committee Against Torture that the Tribunals were "transparent proceedings," saying that "[m]embers of the media, the International Committee of the Red Cross (ICRC), and non-governmental organizations may observe military commissions and the unclassified portions of the CSRT proceedings." (A copy of the Second Periodic Report of the U.S. Committee Against Torture, submitted May 6, 2005, can be viewed at http://www.state.gov/g/drl/rls/45738.htm.)

13. Although DOD did make many of the Tribunals open to the media, its practices unfortunately made it impossible for journalists to attend many of the open hearings. First, DOD regularly conducted Tribunals on days when no reporters physically could attend under

the procedures imposed by DOD for access to Guantanamo. Most weeks, hearings were held Monday through Friday. DOD mandated, however, that journalists coming to Guantanamo to cover the Tribunals arrive on designated flights, usually reaching Guantanamo late on a Monday, after hearings were completed for the day, and leaving Friday morning, before that day's hearings began. As a result, reporters could not generally cover any hearing that took place on a Monday or a Friday.

14. Second, DOD scheduled CSRT hearings so that several Tribunals would proceed simultaneously, but each news organization was permitted to send just one reporter to Guantanamo at a time. As a result, no news organization could cover all of the hearings taking place. DOD personnel initially selected which CSRT hearings reporters would attend, although this practice was discontinued after members of the media, including me, complained about it to several high-ranking DOD officials.

15. DOD also would schedule proceedings of military commissions, convened for those few detainees actually charged with a crime, to occur at the same time as CSRT hearings were taking place. Again, as only one reporter from each news organization could be at Guantanamo at one time, they were unable to cover both the Tribunals and the military commissions. Moreover, when a commission was in session, DOD officials typically said they did not have enough personnel to accompany members of the media to both the CSRT hearings and the military commissions. Because reporters were required to be accompanied at all times by a "minder," this, too, meant AP reporters could not attend some otherwise open CSRT hearings, even though they were present at Guantanamo.

16. AP sought to provide coverage for its members of the events at the Tribunals as they occurred. When an AP reporter could not attend a Tribunal, DOD officials would

provide oral summaries of the unclassified allegations against the particular detainee to AP via telephone. DOD officials initially provided the detainee's age and country of origin during these briefings, and no one from DOD ever requested that this information not be reported. At some point DOD stopped providing during telephone briefings the detainee's country of origin, and also sometimes his age.

17. CSRT hearings were conducted at Guantanamo from July 30, 2004 until January 22, 2005. As a result of the Tribunal hearings, DOD reports that 38 of the detainees at Guantanamo were determined not to be "enemy combatants." The other 520 or so detainees held at Guantanamo were declared to be enemy combatants who, DOD asserts, may be detained until the end of the war on terrorism. (A true and correct copy of DOD's Combatant Status Review Tribunal Summary is attached hereto as Exhibit F.)

AP'S EFFORTS TO OBTAIN TRIBUNAL TESTIMONY AND DOCUMENTS

18. Because we were unable to cover many of the hearings, on November 4, 2004, AP submitted to DOD a request under the Freedom of Information Act for expedited release of: (1) transcripts of all testimony given by any detainee at any CSRT at Guantanamo; (2) written statements given by any detainee; and (3) documents provided by a detainee to his assigned Personal Representative. (A copy of AP's request is attached as Exhibit C to the Complaint; Wolstein Dec. Ex. 1.) On November 18, 2004, the AP submitted an amended request that sought the same records but added a request to receive both their original non-English form and any English translation. (Exhibit E to AP's Complaint.)

19. AP sought expedited treatment of these limited records from the Tribunals because we intended to use the records from the hearings in our reporting on the Tribunals as they were occurring. Because DOD made it impossible for reporters to attend many of the

CSRT hearings, the transcripts were the only way to verify specific information presented to those Tribunals, such as the nature of the unclassified allegations against the detainee. Even in cases where a reporter had attended a hearing, the transcript was sought to serve as a check on the accuracy of the reporter's notes and recollections.

20. Notwithstanding repeated assurances that AP's request was being expedited, DOD did not turn over any of the records while the CSRT hearings were on-going. Indeed, DOD did not provide any of the requested records until after AP sued to get them. Following the initial conference with the Court in this lawsuit, beginning on May 20, 2005, DOD produced 3942 pages of material to AP in several "waves."

21. The records provided to AP appear to relate to the proceedings of 369 separate Tribunals. Although this number falls well short of the 558 Tribunals DOD has said were convened at Guantanamo, DOD has represented that it has no documents relating to the Tribunals requested by AP that are being withheld. Nonetheless, several of the Tribunal transcripts mention detainee statements and documents provided by detainees to their personal representatives, which were entered into evidence but have not been provided to AP. Attached as Exhibit G are some examples of hearing transcripts referring specifically to items called for by AP's FOIA request that do not seem to have been produced.

22. The documents provided to AP are rife with redactions. Annexed as Exhibit H is a collection of documents from three Tribunals as produced by DOD. These documents reflect generally the nature of the information provided and the extent of redactions made by DOD before providing the records. One can see from these examples that the withheld material goes beyond simply name, address and place of employment, and also includes places, events, acquaintances, and a variety of other vital information.

23. While DOD has said that it also withheld the ages of detainees from the records provided to AP, this does not seem to have been done uniformly. Attached as Exhibit I are samples from two transcripts, one where the age has been with held, and another where it was not. I understand that a rough check by AP identified the removal of ages from 19 hearing transcripts, while the ages remain in at least 60 other instances.

THE IMPORTANCE OF DISCLOSING THE IDENTITIES OF DETAINEES

24. There are many reasons why disclosure of the names, ages, and countries of origin of the detainees is important to AP. First, the public has a vital interest in learning the names of the detainees being imprisoned at Guantanamo. Without the "identifying information" withheld by DOD it is impossible to assess meaningfully the performance of the Tribunals whose edited records have been produced. Indeed, with the names removed from the records, it is not even possible to identify which records support a decision to release the detainee and which records support the conclusion that a detainee is an "enemy combatant."

25. As a review of the sample records in Exhibit H will confirm, it is impossible to pursue many of the most basic leads a reporter covering a hearing would typically follow up, because the necessary basic information is missing from the records as provided by DOD. For example, one of the detainees testified at some length about the operation of a civilian organization he worked for and the ways it was used by the Taliban. (Ex. F; AP02032-40.) The redactions deny the public a great deal of information about events in Afghanistan, Pakistan and elsewhere that would shed light on a number of issues of legitimate public concern surrounding the actions of DOD.

26. Other transcripts delete information that could be followed up to confirm or deny explanations being given to the Tribunals by the detainees. (*E.g.*, Ex. F, AP03353-55;

AP03608-16.) One transcript, for example, suggests that a detainee with access to significant amounts of money may be a member of the royal family of some country. Due to the redactions of information, including nationalities, the facts disclosed in the transcript cannot be placed in context to give them meaning or to follow up. (*See* AP03481-85, attached as Ex. E to the Hecker Declaration, and AP03394, omitted from the Hecker Declaration and attached hereto as Exhibit J.)

27. The public has an important interest in testing the facts put before the Tribunals, in order to evaluate the actions of DOD. The only way for a journalist to do this is to get out and check the facts, something reporters do routinely in covering other hearings, but that cannot be done here due to DOD's refusal to release basic information in the record. Disclosure of the identifying information withheld by DOD will allow AP to actually do reporting on the validity of the government's claims about specific detainees.

28. We know that the mistakes and misunderstandings have been made, because some are now documented in the habeas proceedings filed by some detainees. Many other issues about claims made in the CSRT transcripts, however, cannot be checked out because of DOD's redactions. For example, several detainees insist that DOD believes they are someone they are not. (The redacted record from one tribunal demonstrating this problem is annexed as Exhibit K.) There is no way to assess the facts in these cases, because none of the names or other identifying information discussed during the hearings has been disclosed.

29. Public oversight is especially needed because of the difficulties the detainees themselves face in testing the government's contentions. The detainees have no subpoena power or other rights, and the steps taken by DOD to withhold information make oversight by the press all but impossible.

30. Of course, even if spec identifying information could be withheld, the redactions by DOD sweep in too many facts. The public has a significant interest in the disclosure of the ages and nationalities of the detainees, even if their names are not released. DOD has captured an unknown number of minors and detained them as enemy combatants at Guantanamo. For example, based on documents released to AP by DOD where ages were not removed, it is known that three Afghan boys, aged 13 to 15, were released from Guantanamo last year, and one of the CSRT transcripts involves an 18 year old detainee who said he had been at Guantanamo for two years. *See* Paisley Dodds, *Guantanamo prisoners say their youth was stolen by Taliban*, Associated Press, June 7, 2005 (attached hereto as Exhibit L).

31. This detention of minors has caused controversy since detainees were first sent to Guantanamo in January 2002, when human rights groups started protesting the capture and imprisonment of boys younger than 18. In general, the imprisonment of minors raises especially important issues about the government's conduct, and the public has a significant interest in learning the ages of all the detainees.

32. Similarly, the public has a significant interest in knowing the nationalities of the detainees. The DOD's redactions prevent any assessment of where the detainees come from primarily, including for example the percentage of those rounded up in Afghanistan who are foreign nationals. The withholding of information also makes it impossible to assess whether detainees from different countries have been afforded different treatment.

33. Finally, DOD's redactions go too far because the block efforts to investigate and report on allegations of prisoner abuse made by several detainees during their hearings. I have attached as Exhibit M samples of claims of mistreatment and abuse presented to the

hearing officers. Again, as these records reflect, the redactions deprive reporters of many basic facts useful to an evaluation of these claims against government officers.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed: London, England
July 13, 2005

Paisley Dodds

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS,	X	**ECF CASE**
Plaintiff,	:	**Index No. 05 CV 3941**
- against -	:	**Judge Rakoff**
UNITED STATES DEPARTMENT OF DEFENSE,	:	**PROOF OF SERVICE**
Defendant.	X	

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)

SCOTT BAILEY, being duly sworn, deposes and says as follows:

1. I am a legal assistant with the law firm of Levine Sullivan Koch & Schulz, L.L.P. I am not a party to this action, am over 18 years of age, and reside in Brooklyn, New York.

2. On July 13, 2005, I served true copies of the Memorandum in Opposition to Defendant's Motion for Summary Judgment and the Declaration of Paisley Dodds by email transmission and Federal Express priority overnight courier upon:

Elizabeth Wolstein
U.S. Attorney – Civil Division
86 Chambers Street
New York, NY 10007
Elizabeth.Wolstein@usdoj.gov

Scott Bailey
Scott Bailey

Subscribed and sworn to before me
this 13th day of July, 2005
Lisamarie Appel

LISAMARIE APPEL
Notary Public, State of New York
No. 01AP4869703
Qualified in Richmond County
Certificate Filed in New York County
Commission Expires Sept. 2, 20 06